Index.

	Page
Statement as to Jurisdiction	1
(a) Opinion Below	1
(b) Statement of Grounds of Jurisdiction	1
Question Presented	2
Importance of This Case	3
Appendix A	7
Appendix B	22
Appendix C	24

CASES CITED:

Beauharnais v. Illinois, 343 U. S. 250	5
Cantwell v. Connecticut, 310 U. S. 296	4, 6
Chaplinsky, 315 U. S. 568	5
Doubleday & Co., Inc., v. New York, 335 U. S. 848	5
Lovell v. Griffin, 303 U. S. 444	4
Near v. Minnesota, 283 U. S. 697	3, 4, 5, 6
Roth v. Goldman, 172 Fed. (2) 788, 792	5
Winters, 333 U. S. 507	5

STATUTES CITED:

28 U. S. C., Section 1257 (2)	2
Code of Criminal Procedure, Section 22-a	2

OTHER AUTHORITIES:

Lockhart and McClure, The Law of Obscenity and the Constitution, Minnesota Law Review, March, 1954, p. 352	4
Lockhart and McClure, op. cit., p. 320	5
University Chicago Law Review, 222, Note 46	4

Supreme Court of the United States

OCTOBER TERM, 1955.

No.

KINGSLEY BOOKS, Inc., LOUIS FINKELSTEIN, doing business as Times Book Shop, and MARTIN KLEINBERG,
Appellants,
v.
PETER CAMPBELL BROWN, Corporation Counsel of the City of New York,
Appellee.

Statement as to Jurisdiction.

Pursuant to Rule 15, of the Revised Rules, the appellants file this separate statement to support the jurisdiction of the court on this appeal:

(a) Opinion Below.

Copies of the two opinions rendered in the Court of Appeals are appended hereto. The opinion of Special Term, Supreme Court of the State of New York, County of New York, is reported in 208 Misc. 150, and is also found on page 44 of the record.

(b) Statement of Grounds of Jurdisdiction.

(i) The action was brought pursuant to Section 22-a, Code of Criminal Procedure, to enjoin the appellants from selling past and future issues of certain publications on the ground that they are obscene. Surrender

and destruction of the publications would follow the injunction. A copy of the statute is appended hereto as Appendix B.

(ii) The date of the judgment of the Court of Appeals is April 27, 1956, and its entry is the same date (Appendix C). The date of filing of the notice of appeal is May 8, 1956, in the Supreme Court, State of New York, New York County.

(iii) Jurisdiction is conferred by 28 U. S. C., Section 1257 (2).

Question Presented.

The sole question presented is the constitutional validity under the Federal Constitution of Section 22-a, Code of Criminal Procedure of the State of New York. Appellants claim that this statute violates due process in that it is a prior restraint upon publications as protected by the Fourteenth Amendment to the Constitution of the United States which incorporates the guarantees of free speech and press found in the First Amendment to that Constitution.

The appellee as Corporation Counsel of the City of New York instituted this action pursuant to said statute to restrain the appellants from distributing the issues, past and future, of a publication entitled, "Nights of Horror." The complaint further requested that the appellants be directed to surrender all copies of said publication in their possession to the sheriff and that said publications be destroyed. The ground for the action was the assertion made that these publications are obscene. The answer of the appellants raised the issue of the constitutionality of the statute (Record, p. 10). Upon the trial by motion to dismiss the complaint the issue of unconstitutionality was again raised (Record, p. 40, and

renewed, p. 41). The Trial Justice thereupon passed on the question of constitutionality and wrote a lengthy opinion on that issue and held the statute to be constitutional. (Record, p. 44).

Thereafter, an appeal was taken directly to the Court of Appeals from the judgment of Trial Court, pursuant to New York practice, because the sole issue was the unconstitutionality of the statute. The Court of Appeals ruled on that sole issue on the merits and held that the law is constitutional. The Court of Appeals affirmed the judgment of the Trial Court, with three Judges voting to affirm on the basis of one opinion and three Judges for the reasons set forth in another opinion.

Importance of This Case.

In the second sentence of Judge Fuld's opinion, it is said:

> "The importance and perplexities of the constitutional issue presented persuade me that there must be a more full discussion than some of my associates believe necessary of the reasons for, and the reach of the decision made."

This case squarely presents to the Court an issue not previously decided by it, and which was left open by the decision in *Near v. Minnesota*, 283 U. S. 697.

Judge Fuld also stated:

> "The issue whether restraints in advance of production may be applied to obscene matter has, however not yet been squarely decided."

Resolution is necessary for the question, whether there may be a prior restraint of a publication by administrative agent or court on the ground that a publication is obscene.

This case raises the sole question as to the constitutionality of a law which provides a prior restraint against distribution of publications deemed obscene. The question is therefore ripe for decision.

The prior restraint consists in the injunction decree which restrains the distribution of a book already published. This Court previously held that distribution is as well-protected as publication. *Lovell v. Griffin*, 303 U. S. 444. This Court also held that restraint by a court is on the same footing with that of restraint by an administrative official. *Cantwell v. Connecticut*, 310 U. S. 296.

Indeed, the protection from prior restraint is significant only after a book is published and is ready for distribution. Only then does the protection against prior restraint have any meaning. It can hardly be said that there can be a prior restraint of an idea that merely resides in the brain of the author. It is only after the idea has been reduced to publication and is about to circulate that protection becomes meaningful.

So in this case prior restraint is present, because what was done here was to enjoin the circulation of a publication already in being.

The Near case, it is important to remember, involved not only an injunction against publication of future issues of the publication, but also distribution of issues already in being.

While in the *Near* case by way of dictum, language is found that obscene publications are not protected, nevertheless, the dictum has never been applied or clarified. See, Lockhart and McClure, The Law of Obscenity, and the Constitution, Minnesota Law Review, March, 1954, p. 352, under "An Open Question"; also, 22 University Chicago Law Review, 222, Note 46.

The dictum in *Near* contains two obscurities. First, the statement that obscene publications are not constitutionally protected could have meant that the publisher or distributor of the publications might be punished, as was the situation in *Chaplinsky*, 315 U. S. 568, and *Winters*, 333 U. S. 507. This would leave untouched the doctrine against prior restraints. The *Near* dictum, which was followed in *Chaplinsky* and *Winters*, simply holds, therefore, that the publisher and distributor of such publications may be punished (cf. *Doubleday & Co., Inc., v. New York*, 335 U. S. 848, and *Beauharnais v. Illinois*, 343 U. S. 250).

A second obscurity of the dictum is found in the subsequent joinder of the obscene with the *libelous* as not being constitutionally protected (see minority opinion in *Near* as to equating both offenses). Yet in the *Near* case the libel was most offensive. Nevertheless, this Court decided that such publications could not be restrained from being distributed or from being published in the future.

If one is drawn into comparing the social evils to be restrained it could be argued with great force that the libels of a race, and incitements against persons of that race in *Near* presented a much greater social evil than the publications in this case. Yet this Court refused to permit such inflammatory publications to be restrained. Obscenity may have its evils. What it means when applied may be as debatable and as bewildering as it was to Judge Frank in *Roth v. Goldman*, 172 Fed. (2) 788, 792. See also, *Lockhart and McClure*, op. cit., p. 320. This doubt could hardly be applicable to the scurrilous and vicious libel against a race, such as found in *Near*.

The Court of Appeals here stated: "The issue whether restraints in advance of publication may be applied to obscene matter has, however, not yet been squarely decided." Nevertheless, that Court (like the *minority* in

Near) found a distinction between a prior restraint exercised by an administrative board against distribution of a motion picture and the restraint exercised by a Judge. This distinction, it is respectfully submitted, is not tenable. This Court previously held that there was no distinction, beginning with the *Near* case, in which an injunction issued by a Court, through *Cantwell v. Connecticut*, where this Court said:

> *"A statute authorizing previous restraint upon the exercise of the guaranteed freedom by judicial decision after trial is as obnoxious to the Constitution as one providing for like restraint by administrative action."* (Italics supplied.)

The reason the question presented is substantial for plenary consideration is that this Court should decide whether distribution of a book may be enjoined because it has been found to be obscene by a Judge. Appellants contend that the Constitution forbids all prior restraints, that the injunction against distribution of existing books, like in *Near*, is a prior restraint and that like *Near* a prior restraint is forbidden to Judges as w ll as to administrative officials.

The office of censor cannot be conferred on a Judge instead of on an administrative official. Yet, the statute here does just that.

Because the principle involved herein has not been settled and its application is of a recurrent nature it is submitted that this appeal raises a substantial question that should be reviewed by this Court.

Respectfully submitted,

EMANUEL REDFIELD,
Attorney for Appellants.

APPENDIX A.

Opinion.

State of New York
Court of Appeals

PETER CAMPBELL BROWN, etc.,
Respondent,
vs.
KINGSLEY BOOKS, Inc., *et al.*,
Appellants.

FULD, J.:

Although we are all agreed for affirmance, we reach that conclusion by somewhat different routes. The importance and perplexities of the constitutional issue presented persuade me that there must be a more full discussion than some of my associates believe necessary of the reasons for, and the reach of, the decision being made.

Enacted in 1941 (L. 1941, ch. 925) and amended in 1954 (L. 1954, ch. 702), Section 22-a of the Code of Criminal Procedure was designed to supplement existing criminal sanctions by providing an additional civil remedy in the Supreme Court, by way of an action for an injunction, against the sale and distribution of written or printed matter found, after trial, to be obscene. Modeled on the language of Section 1141 of the Penal Law, the statute prohibiting the sale and distribution of items obscene, Section 22-a, insofar as here pertinent, embraces "any book, magazine, pamphlet and coming book, story paper, writing, paper, picture, drawing, photograph, figure, image or any written or printed matter of an indecent character which is obscene, lewd, lascivious, filthy, indecent or

disgusting." It vests the right to maintain the action in the chief executive or legal officer of any city, town or village and provides that it may be brought against anyone who "sells or distributes or is about to sell or distribute or has in his possession with intent to sell or distribute or is about to acquire possession with intent to sell or distribute" any such matter (subd. 1). If an injunction is granted, the statute continues, the resulting order or judgment must direct the defendant to "surrender" the offending matter to the sheriff who "shall be directed to seize and destroy the same" (subd. 3).

The present suit, instituted by the Corporation Counsel of the City of New York against a number of book sellers with premises in that city, concerns a series of paper-bound booklets collectively entitled "Nights of Horror," which had been found displayed for sale in defendants' stores. Members of the police force, who testified at the trial, had purchased copies of these booklets from the various defendants, at prices ranging from $2 to $4 a copy. The publications themselves were also introduced in evidence. The Trial Judge, in a carefully considered opinion, found that the booklets were plainly obscene and pornographic, "dirt for dirt's sake," and held that the statute did not violate any constitutional guarantee. He thereupon granted judgment (1) permanently enjoining defendants from distributing, selling, or acquiring possession of such publications, (2) requiring them forthwith to surrender to the sheriff for destruction all copies in their possession, and (3) directing the sheriff to seize and destroy such copies, in the event of defendants' failure to surrender them.

The paper-covered booklets before us are indisputably pornographic, indisputably obscene and filthy. Defendants concede as much and also acknowledge, in effect, that, had they been criminally prosecuted for violating the obscenity provisions of the Penal Law, no constitutional argument

could successfully have been leveled against resulting convictions. Indeed, not questioning the definiteness of the statutory standard, not challenging the test of obscenity applied by the Trial Judge, who concluded that the booklets were obscene under any of the judicially-announced criteria and not objecting to the failure to require a jury trial,[1] defendants' sole attack upon the statute is that the remedy by injunction constitutes an unconstitutional "prior restraint," interfering with freedom of speech and press (U. S. Const., First and Fourteenth Amendments; N. Y. Const., Art. I, §8).[2]

There is, of course, no doubt that freedom of speech and press, so basic to a free and dynamic society, extends to all media of expression (see *Joseph Burstyn, Inc., v. Wilson*, 343 U. S. 495, 501-502; see, also, Chafee, *Free Speech in the United States* [1941], p. 545), that it protects distribution as well as initial publication (see *Lovell v. Griffin*, 303 U. S. 444; *Grosjean v. American Press Co.*, 297 U. S. 233), and that it embraces writings or other forms of expression designed for entertainment or amusement, as well as those concerned with the exposition of ideas (see *Winters v. New York*, 333 U. S. 507, 510; *Hannegan v. Esquire, Inc.*, 327 U. S. 146, 153). While the right of free expression is not absolute or unqualified under all circumstances, it is clear that any invasion of that right must find justification in some overriding public interest, and that restricting legislation must be narrowly drawn to

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[1] Even in a criminal prosecution based upon Section 1141 of the Penal Law, involving as it does a misdemeanor charge, the defendant is not entitled to a trial by jury as a matter of constitutional right (N. Y. Const., Art. VI, §18; see *People v. Kaminsky*, 208 N. Y. 389, 394; *People ex rel. Cosgriff v. Craig*, 195 N. Y. 190, 195-196; see, also, N. Y. C. Crim. Cts. Act, §31, subd. 1 [b], [c]).

[2] Nor do we concern ourselves with the further provision of the statute directing the Court to render its decision "within two days of the conclusion of the trial" (subd. 2), in view of the fact that the parties agreed neither to invoke nor insist upon that requirement.

meet an evil which the state has a substantial interest in correcting (see *Joseph Burstyn, Inc., v. Wilson*, *supra*, 343 U. S. 495, 502-504; *Feiner v. New York*, 340 U. S. 315, 319; *Niemotko v. Maryland*, 340 U. S. 268, 271-272; *Winters v. New York*, *supra*, 333 U. S. 507, 509; *Cantwell v. Connecticut*, 310 U. S. 296, 307-308; *Thornhill v. Alabama*, 310 U. S. 88, 97-98, 105).

That clearly-drawn regulatory legislation to protect the public from the evils inherent in the dissemination of obscene matter, at least by the application of criminal sanctions, is not barred by the free speech guarantees of the First Amendment, has been recognized both by this court (see *People v. Doubleday & Co., Inc.*, 297 N. Y. 687, affd. by equally divided court, 335 U. S. 848; *People v. Wendling*, 258 N. Y. 451; *People v. Pesky*, 254 N. Y. 373; *People v. Muller*, 96 N. Y. 408), and by the United States Supreme Court (see *United States v. Alpers*, 338 U. S. 680; *Winters v. New York*, *supra*, 333 U. S. 507, 510, 518, 520; *United States v. Kimehouse*, 285 U. S. 424; see, also, *Chaplinsky v. New Hampshire*, 315 U. S. 578, 571-572; *Near v. Minnesota*, 283 U. S. 697, 716; *Beauharnais v. Illinois*, 343 U. S. 250, 266). Imprecise though it be—its "vague subject matter" being largely "left to the gradual development of general notions about what is decent" (*per* Learned Hand, J., *United States v. Kennerly*, 209 Fed. 119, 121)—the concept of obscenity has heretofore been accepted as an adequate standard. Indeed, in the *Winters* case, *supra*, 333 U. S. 507, the Court not only indicated that the collocation of the very words found in

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[3] It is noteworthy that studies are for the first time being made, through such scientific skills as exist, concerning the impact of the obscene, in writings and other mass media, on the mind and behavior of men, women and children. (See, e. g., Jahoda and Staff of Research Center for Human Relations, New York University [1954], *The Impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate.*) The findings ultimately arrived at will no doubt prove helpful to the legislatures and courts of the future in dealing with the problem.

Section 1141 of our Penal Law, "obscene, lewd, lascivious, filthy, indecent or disgusting," is sufficiently "well understood through long use in the criminal law" to satisfy the due process requirements of definiteness and certainty (333 U. S., at p. 518), but actually pointed to the provision as "an example" of a statute wherein "apt words" are used "to describe the prohibited publications" (333 U. S., at p. 520).[4]

Thus, by virtue of Section 1141, it has long been a misdemeanor in this state, punishable by imprisonment or fine or both, to sell or distribute any written or printed obscene material of the kind described in Section 22-a of the Code. Similar statutes are in effect in almost all of the other jurisdictions in this country (see Note, 22 U. of Chi. L. Rev. 216). The legislature, however, apparently concluded that such penal sanctions were inadequate to stem the rising tide of obscene and pornographic publications that have, in recent years, flooded the book and periodical market, and the supplemental remedy of an equity action for an injunction was thereupon devised (cf. Report of New York State Joint Legislative Committee to Study the Publication of Comics, Leg. Doc. [1954], No. 37, pp. 31-32). Whether or no the legislature acted wisely is, of course, no concern of the courts. Our inquiry is limited to whether its act impinges upon free expression.

As already noted, no injunction may issue under Section 22-a except after a full trial of the issues, and only upon a finding that the challenged publication is of the same character as would subject the defendant to punishment under the pertinent provisions of the Penal Law. What the statute does it to provide an additional sanction against the dissemination of obscene matter.

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[4] Application of the standard may, perhaps, raise constitutional questions in individual cases (cf. *Doubleday & Co. v. New York*, 335 U. S. 848, affg., by equally divided court, 297 N. Y. 687; *Roth v. Goldman*, 172 F. 2d 788, 792, *per* Frank, C. J., concurring; see Lockhart & McClure, Literature, The Law of Obscenity and the Constitution, 38 Minn. L. Rev. 295), but the present is not such a case.

It is, however, defendants' position that the constitution limits the state to the imposition of punishment, and that distribution of the writing itself may not be prevented. An injunction, such as the present one, even though it is issued after publication and after a judicial trial, is characterized as such suppression and censorship as to stamp it an impermissible "prior restraint." In other words, it is urged, as long as the publisher or vendor of a writing is willing to risk the imposition of criminal penalties, he has an absolute right to proceed with its publication or distribution and any restriction of that right is unwarranted, since, among other things, it would deprive the public of the opportunity of reading and making its own appraisal of the challenged material.

The major, though not exclusive, purpose of the guarantee of free expression, it has been observed, is "to prevent previous restraints upon publication" (*Near v. Minnesota, supra*, 283 U. S. 697, 713; *Joseph Burstyn, Inc., v. Wilson, supra*, 343 U. S. 495, 503). Though difficult of precise formulation (see Emerson, The Doctrine of Prior Restraint, 20 Law and Contemporary Problems, 648), this principle of immunity from prior restraint has been applied by the United States Supreme Court in a variety of situations to strike down licensing or censorship systems under which the right of speech, publication or assembly was conditioned upon obtaining the advance approval of an executive board or official vested with broad or undefined discretion (see, e. g., *Poulos v. New Hampshire*, 345 U. S. 395; *Kunz v. New York*, 340 U. S. 290; *Niemotko v. Maryland, supra*, 340 U. S. 268; *Cantwell v. Connecticut, supra*, 310 U. S. 296; *Schneider v. State*, 308 U. S. 147). As the Court has, however, pointed out, "The protection even as to previous restraint is not absolutely unlimited," although the limitation has been recognized "only in exceptional cases" (*Near v. Minnesota, supra*, 283 U. S. 697, 716; see, also, *Joseph Burstyn, Inc., v. Wilson, supra*, 343 U. S. 495, 504).

The Supreme Court has asserted, by way of dictum, that the control of obscenity presents such an exceptional case. In *Near v. Minnesota, supra*, 283 U. S. 697, 716, Chief Justice Hughes, in discussing certain extraordinary areas exempt from the sweeping prohibition against prior restraint, stated that one of the exceptions was that "the primary requirements of decency may be enforced against obscene publications," and similar reservations have also been expressed elsewhere (see *Chaplinsky v. New Hampshire, supra*, 315 U. S. 568, 571-572; *Lovell v. Griffin, supra*, 303 U. S. 444, 451; see, also, Chafee, *op. cit.*, p. 10). The issue whether restraints in advance of publication may be applied to obscene matter has, however, not yet been squarely decided. In the area of motion picture censorship—involving a true prior restraint by an administrative body—the Supreme Court, while striking down various other criteria on the ground that they did not satisfy the minimum requirements of definiteness and certainty, has thus specifically left open the question "whether a state may censor motion pictures under a clearly-drawn statute designed and applied to prevent the showing of obscene films" (*Joseph Burstyn, Inc., v. Wilson, supra*, 343 U. S. 495, 505-506; see *Superior Films v. Dept. of Education*, 346 U. S. 587; *Commercial Pictures Corp. v. Regents*, 346 U. S. 587; *Gelling v. Texas*, 343 U. S. 960; cf. *Holmby Productions, Inc., v. Vaughn*, 350 U. S. 870).[5]

[5] I do not believe that *Holmby Productions* (*supra*, 350 U. S. 870) answers the question thus left open in the *Burstyn* case. The Kansas statute there considered provided for the banning of any motion picture found by the state's board of review to be "obscene, indecent or immoral, or such as tend to debase or corrupt morals." The film, "The Moon is Blue," while labeled by the board as "obscene," as well as "indecent and immoral," was specifically condemned for the following stated reason:

> "Sex theme throughout, too frank bedroom dialogue; many sexy words; both dialogue and action have sex as their theme."

The Supreme Court reversed the judgment of the Kansas high court which had accepted the board's interpretation of the statute as well as its determination (177 Kan. 728). It is our surmise that this decision of the Supreme Court—reflected in a *per curiam*, merely citing *Burstyn* (*supra*, 343 U. S. 495) and *Superior Films* (*supra*, 346 U. S. 587)—

We are not, in my opinion, required in this case to decide categorically the validity, under all circumstances, of any and every prior restraint aimed at obscene matter, regardless of the nature and scope of the regulatory measure employed or of the particular medium of expression involved. While strong objections have been voiced against any practice of general censorship, even in the area of obscenity, and whether administered by an administrative body or a judicial tribunal (see Emerson, *supra*, 20 Law and Contemporary Problems, at pp. 661, 670-671; cf. *Superior Films v. Dept. of Education*, *supra*, 346 U. S. 587, 588, per Douglas, J., concurring), that broad question is not here presented. Sharp and precise lines cannot always be drawn between permissible and non-permissible regulatory measures in the realm of expression (see *Winters v. New York*, *supra*, 333 U. S. 507, 518; *Joseph Burstyn, Inc., v. Wilson*, *supra*, 343 U. S. 495, 517-518, *per* Frankfurter, J., concurring). As applied to the control of obscenity, a scheme of advance censorship directed against all *possibly* obscene writings would, in my judgment, go too far. The case before us, however, concerns a regulatory measure of far narrower impact, of a kind neither entailing the grave dangers of general censorship nor productive of the abuses which gave rise to the constitutional guarantees (cf. Pound, Equitable Relief Against Defamation and Injuries to Personality, 29 Harv. L. Rev. 640, 650-651).

There is nothing in the statute before us that constitutes or resembles a system of licensing or other threshhold approval, which would, for example, operate as a pervasive restraint upon all expression relating to sex problems or

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turned solely on the wide reach and the essential vagueness of the standard employed by the Kansas court. Since any film could apparently be banned as "obscene, indecent or immoral" if a sex theme predominated, the term "obscene" was no narrower, no more definite or certain, than the criteria previously stricken as too vague in the *Commercial Pictures* and *Superior Films* cases (*supra*, 346 U. S. 587).

behavior and which would ban and suppress, without a censor's imprimatur, any work of literature dealing with those subjects. On the contrary, Section 22-a makes no attempt to subject writings to the scrutiny and screening of a censor prior to publication. The statutory procedures may be invoked only after publication, and no work may be condemned except upon a formal adjudication of obscenity after a trial conducted in accordance with the essential requirements of due process of law. The mind of the Trial Judge must be satisfied, from a reading of the challenged writing and a consideration of other pertinent evidence, that is is, indeed, of the type and character condemned by the statute. Moreover, his findings are subject to full appellate review on the facts as well as the law (Civ. Prac. Act, §584). The procedures thus provided are to be contrasted with the usual features of advance censorship, under which a large measure of discretion is reposed in the censoring official, the procedural safeguards of judicial proceedings are not available, only limited judicial review is allowed and the burden rests on the publisher or vendor to establish the arbitrariness of an adverse ruling (see Emerson, *supra*, 20 Law and Contemporary Problems, at pp. 656-660).

In point of fact, examination of the operation and effect of Section 22-a reveals substantially no greater interference with the freedom of the publisher or vendor than that presented by the possibility of punishment under the Penal Law. There can be little doubt that the rigid enforcement of such penal provisions, though operating by indirection, may serve as effectually as direct action by injunction, if not more so, to deter publication of an obscene work (see Pound, *supra*, 29 Harv. L. Rev. 640, 651; Emerson, *supra*, 20 Law and Contemporary Problems, at p. 660). In the final analysis, the effectiveness of the injunctive remedy must itself depend upon punitive sanctions, by way of contempt proceedings, for its enforcement;

and, if a publisher or vendor would not be deterred by the prospect of prosecution under the Penal Law, he might equally be unaffected by the threat of punishment for contempt. These words are, of course, limited to the statute before us dealing with obscenity, and nothing here written is to be taken as sanctioning the injunctive process in dealing with other objectionable or anti-social material, such as libel.

The reliance which defendants place upon *Near v. Minnesota* (*supra*, 283 U. S. 697) is untenable. That case involved a Minnesota statute which authorized the issuance of an injunction, in a suit to be brought in the name of the state, against the further publication of any newspaper or periodical adjudged to be "malicious, scandalous and defamatory."[6] Under the statute, any articles deemed to be derogatory to a public officer could be branded "malicious, scandalous and defamatory," if the publisher were unable to establish that they were true *and* "published with good motives and for justifiable ends" (283 U. S., at pp. 709-710). Once such an injunction was issued, resumption of any future printing was banned and punishable as a contempt, unless the publisher was able to satisfy the Court as to the character of the new publication. The Court would thus be constituted a censor to pass on the contents of future issues in advance of publication, and whether the publisher "would be permitted again to publish matter deemed to be derogatory to the same or other public officers would depend upon the Court's ruling" (283 U. S., at p. 712). It was this feature of the law, particularly as applied to newspaper comment upon matters of public importance, upon ideas in the realm of political ex-

[6] The same statute also authorized an injunction against the further publication of any newspaper or periodical adjudged to be "obscene, lewd and lascivious," but that portion of the statute was not involved in the case.

pression, that was regarded by the Supreme Court as "of the essence of censorship" and an unwarranted infringement on freedom of discussion (283 U. S., at p. 713).

The features condemned in *Near* are here absent. The statute now under consideration deals exclusively with matters in the field of lustful emotion. Erotics, not politics, is its subject, and, as already noted, the writings here condemned are unredeemed by even an iota of idea content or of artistic worth. And, unlike the statute in *Near*, which sanctioned a general and future restraint, there is here no restraint of any kind on the publication or distribution of material to be written or produced in the future. The Corporation Counsel in the court below sought to have the statute read as authorizing an injunction against the sale and distribution, not only of any published work found to be obscene, but also of any future work in the same series as well. This, the Trial Court very properly refused to do, and it is my judgment that the statute does not permit of the suggested contrary construction.

In short, careful analysis of the operation and effect of Section 22-a, in relation to the basic aims and objectives of the constitutional guarantees, persuades me that the limited injunctive remedy here provided may not be condemned as a forbidden prior restraint. As a matter of fact, analogous decisions under the Federal Tariff Act of 1930 (Act June 17, 1930, ch. 497, tit. III, §305; 19 U. S. C., §1305) are at hand as authority that such measures do not involve any aspect of prior restraint at all, since the statutory penalties are inflicted only after the challenged work has already been published. The Tariff Act thus provides for the seizure by the customs collector of any obscene matter imported into this country, and authorizes the United States District Court to direct the forfeiture, confiscation and destruction of

such matter upon adjudication after trial that it is obscene. Although the constitutionality of these provisions has apparently never been passed upon by the Supreme Court, the lower Federal Courts have uniformly either held (see *Besig v. United States*, 208 F. 2d 142; *United States v. One Obscene Book Entitled "Married Love,"* 48 F. 2d 821, 822) as assumed (see *Parmelee v. United States*, 113 F. 2d 729; *United States v. One Book Called Ulysses*, 72 F. 2d 705; *United States v. One Unbound Volume, etc.*, 128 F. Supp. 280) the statute to be constitutional. Thus, in *United States v. One Obscene Book Entitled "Married Love," supra*, 48 F. 2d 821, Judge Woolsey rejected the contention that the statute impinged on the right of freedom of the press, noting that it did "not involve the suppression of a book before it is published"; in the course of his opinion, he wrote (p. 822):

> "After a book is published, its lot in the world is like that of anything else. It must conform to the law and, if it does not, must be subject to the penalties involved in its failure to do so. Laws which are thus disciplinary of publications, whether involving exclusion from the mails or from this country, do not interfere with freedom of the press."

It is further urged that even publications adjudged to be obscene cannot constitutionally be withheld from free circulation in the market place of ideas; that, apart from the rights of the publisher and vendor, the public itself has the right to read and examine whatever is published and to form its own opinion of a publication's value and propriety. But here, as in other situations, the question is one of balancing the several competing interests involved. Where the publication is one plainly obscene, serving no purpose but to satisfy a market for filth and

smut, there could be no harm to the public in completely removing it from circulation following a judicial adjudication of obscenity. The Supreme Court has emphasized, in reference to the federal statute declaring obscene material non-mailable (35 Stat. 1129; 18 U. S. C., §334), that there is no necessity "to satisfy all tastes, no matter how perverted." (*Hannegan v. Esquire, Inc., supra*, 327 U. S. 146, 158.)

In reaching the conclusion which I do, I must, of course, assume that the statutory proscription of obscenity will be applied with great care and selectivity so as not to interfere with the circulation of legitimate works of literature; that the libidinous character of a challenged work will be determined by viewing it "broadly as a whole" (*Halsey v. N. Y. Society*, 234 N. Y. 1, 4-5), with reference to "its dominant effect," "not on any particular class, but on all those whom it is likely to reach" (*United States v. Levine*, 83 F. 2d 156, 157; *United States v. One Book Called Ulysses, supra*, 72 F. 2d 705, 707-708, affg. 5 Fed. Supp. 182); and that consideration will be given, among other factors, to "the established reputation of the work in the estimation of approved critics, if the book is modern, and the verdict of the past, if it is ancient" (*United States v. One Book Called Ulysses, supra*, 72 F. 2d 705, 708). The danger of arbitrary or erroneous decision under the statute is minimized by the availability of appellate review of the Trial Court's findings of fact. The same danger is presented in criminal prosecutions for obscenity, and the remedy lies, not in preventing the state from more effectively enforcing its policy against the circulation of the obscene, but in making certain that the Courts apply standards that will insure the least possible risk of interference with unobjectionable publications.

The judgment appealed from should be affirmed, with costs.

DESMOND, J.:

Defendants expressly admit the obvious fact that the books which they sold, and the further sale of which has been here enjoined, are obscene. They thus concede that the books are such as are subject under Section 22-a of the New York Code of Criminal Procedure to an injunction at the suit of the Corporation Counsel, who brought this action. Those concessions leave defendants with one possible ground for appeal, and that ground they take. Their sole assertion in this court is that Section 22-a is unconstitutional because, say defendants, any and every prior restraint on the publication or sale of obscene literature violates the First Amendment. Since no other question is presented, we must limit ourselves to answering that question. It detracts nothing from Judge Fuld's fine opinion to point out that its discussion of many other questions not before us on this appeal is not binding on this Court.

Answering the one argument made to us, we hold on most ample authority that the First Amendment does not protect obscene books against prior restraint (*Chaplinsky v. New Hampshire*, 315 U. S. 568, 572; *Near v. Minnesota*, 283 U. S. 697, 716; *Burstyn v. Wilson*, 343 U. S. 495, 502-504; see *Beauharnais v. Illinois*, 343 U. S. 250, 266; *Ex parte Jackson*, 96 U. S. 727, and *Hannegan v. Esquire*, 327 U. S. 146). The standard set up by Section 22-a, "obscene, lewd, lascivious, indecent or disgusting," is a valid and adequate one (*Winters v. New York*, 333 U. S. 507, 518; see *Rosen v. United States*, 161 U. S. 29, 42; *Swearingen v. United States*, 161 U. S. 446, 451; *Robertson v. Baldwin*, 165 U. S. 275, 281, 18 U. S. C. 1461; *United States v. Limehouse*, 285 U. S. 424; *Hannegan v. Esquire*, 327 U. S. 146, 156, 158, *supra*; *Times Film Corp. v. Chicago*, ___ F. Supp. ___, decided

March 21, 1956; *People v. Muller*, 96 N. Y. 408; *People v. Doubleday*, 297 N. Y. 687, affd. by equal vote 335 U. S. 848; *Comm. v. Holmes*, 17 Mass. 335).

No one claims that Section 22-a lacks appropriate procedural protections for those sued under it.

The judgment should be affirmed, with costs.

Dye and Van Voorhis, JJ., concur in opinion of Fuld, J.; Conway, Ch. J., and Froessel, J., concur in opinion of Desmond, J.; Burke, J., taking no part.

Judgment affirmed, with costs.

APPENDIX B.

Statute Involved.

Section 22-a of the Code of Criminal Procedure (L. 1941, ch. 925), as amended by L. 1954, ch. 702, effective July 1, 1954, reads as follows:

"§22-a. OBSCENE PRINTS AND ARTICLES; JURISDICTION.

The supreme court has jurisdiction to enjoin the sale or distribution of obscene prints and articles, as hereinafter specified:

1. The chief executive officer of any city, town or village or the corporation counsel, or if there be none, the chief legal officer of any city, town, or village, in which a person, firm or corporation sells or distributes or is about to sell or distribute or has in his possession with intent to sell or distribute or is about to acquire possession with intent to sell or distribute any book, magazine, pamphlet, comic book, story paper, writing, paper, picture, drawing, photograph, figure, image or any written or printed matter of an indecent character, which is obscene, lewd, lascivious, filthy, indecent or disgusting, or which contains an article or instrument of indecent or immoral use or purports to be for indecent or immoral use or purpose; or in any other respect defined in section eleven hundred forty-one of the penal law, may maintain an action for an injunction against such person, firm or corporation in the Supreme Court to prevent the sale or further sale or the distribution or further distribution or the acquisition or possession of any book, magazine, pamphlet, comic book, story paper, writing, paper, picture, drawing, photograph, figure or

image or any written or printed matter of an indecent character, herein described or described in section eleven hundred forty-one of the penal law.

2. The person, firm or corporation sought to be enjoined shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial.

3. In the event that a final order or judgment of injunction be entered in favor of such officer of the city, town or village and against the person, firm or corporation sought to be enjoined, such final order of judgment shall contain a provision directing the person, firm or corporation to surrender to the sheriff of the county in which the action was brought any of the matter described in paragraph one hereof and such sheriff shall be directed to seize and destroy the same.

4. In any action brought as herein provided such officer of the city, town or village shall not be required to file any undertaking before the issuance of an injunction order provided for in paragraph two hereof, shall not be liable for costs and shall not be liable for damages sustained by reason of the injunction order in cases where judgment is rendered in favor of the person, firm or corporation sought to be enjoined.

5. Every person, firm or corporation who sells, distributes, or acquires possession with intent to sell or distribute any of the matter described in paragraph one hereof, after the service upon him of a summons and complaint in an action brought by such officer of any city, town or village pursuant to this section is chargeable with knowledge of the contents thereof."

APPENDIX C.

Judgment Appealed From.

COURT OF APPEALS

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 27th day of April in the year of our Lord one thousand nine hundred and fifty-six, before the Judges of said Court.

Witness,

The Hon. Albert Conway, Chief Judge Presiding.
Raymond J. Cannon, Clerk.

Remittitur April 27, 1956.

PETER CAMPBELL BROWN, Corporation Counsel of the City of New York,

Respondent,

vs.

KINGSLEY BOOKS, Inc., MARTIN KLEINBERG and LOUIS FINKELSTEIN, doing business as Times Square Book Shop,

Appellants,

and

METROPOLITAN BOOK SHOP, Inc., & Ors., &c.,

Defendants.

BE IT REMEMBERED, That on the 31st day of October in the year of our Lord one thousand nine hundred and fifty-five, Kingsley Books, Inc., Martin Kleinberg and

Louis Finkelstein, doing business as Times Square Book Shop the appellants in this cause, came here unto the Court of Appeals, by Emanuel Redfield and Sidney Glasser, their attorneys, and filed in the said Court Notices of Appeal and return thereto from the judgment of the Supreme Court, New York County. And Peter Campbell Brown, Corporation Counsel of the City of New York, the respondent—in said cause, afterwards appeared in said Court of Appeals in person.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Emanuel Redfield of counsel for the appellant, and by Mr. Seymour B. Quel of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, with costs, as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

sgd/ RAYMOND J. CANNON
Clerk of the Court of Appeals of
the State of New York.